

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2005B141

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RICHARD RADEBAUGH,
Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on November 6 and 7, 2006. The record remained open until November 13, 2006 for the submission of an exhibit. Complainant appeared through Patricia Cookson, Esquire. Respondent appeared through Assistant Attorneys General Brooke Meyer and Christopher Puckett. Ron Sessem, Director of the Division of Facilities Management, was Respondent's advisory witness.

MATTER APPEALED

Complainant, Richard Radebaugh ("Radebaugh" or "Complainant") appeals his disciplinary termination by Respondent, Department of Human Services (DHS or Respondent). Complainant seeks reinstatement to his position as Laundry Worker I and an award of back and benefits.

For the reasons set forth below, Respondent's action is affirmed.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's disciplinary action was arbitrary, capricious or contrary to rule or law; and,
3. Whether Respondent discriminated against Complainant on the basis of disability.

FINDINGS OF FACT

1. Complainant was hired on June 1, 1990 as a Laundry Worker I in the Division of Facilities Management (DFM) at the Grand Junction Regional Center. The Regional Center is a large facility consisting of dormitories which house developmentally

disabled and mentally ill individuals unable to care for themselves, and youth corrections inmates.

2. Complainant worked in the Laundry area. He and his coworkers were responsible for the washing, drying, folding, pick-up and delivery of all laundry for the Regional Center dormitories.
3. Laundry workers, including Complainant, often worked alongside developmentally disabled residents, who participated in special work programs in the unit.

Complainant's Injury

4. In April of 1971, Complainant was in a car accident. He suffered serious damage to the frontal lobe of his brain.
5. Complainant's treating physician for the past eight years has been Dr. Michael Joseph Pramenko. At the outset of Dr. Pramenko's treatment of Complainant, Complainant informed him that he had a brain injury from the car accident.
6. Dr. Pramenko graduated from Dartmouth Medical School and practices family medicine in Grand Junction. Twenty percent of his practice focuses on psychiatric care. Dr. Pramenko was certified as an expert in family medicine with an emphasis in psychiatric issues.
7. Complainant's brain injury causes him to have difficulty inhibiting certain behaviors. Complainant's uninhibited behavior caused by the head injury includes: laughing inappropriately, saying things and telling jokes the average person would not tell, and losing his temper. When Complainant loses his temper, it is difficult for him to exercise the control necessary to regain his composure. Complainant's speech is slurred, but understandable. All of these problems are typical of brain injured individuals.
8. Complainant is unable to foresee when he will have a temper outburst; he is unable to recognize the "triggers" for his temper.
9. With the exception of these problems, Complainant is able to converse and communicate normally with other people on a regular basis.
10. According to Dr. Pramenko, one of the most effective ways for Complainant to handle temper outbursts is to walk away from a tense situation. Complainant has attended at least two anger management courses during his employment with DHS; one of the coping skills he learned in those courses is to walk away from situations that are upsetting to him.

Complainant's Performance History

11. Clifford Jay Wheeler has been Laundry Housekeeping Manager at DFM for fifteen years. He manages the entire laundry and housekeeping operation at the Division, and is responsible for all operations; budgeting; staffing; and personnel issues. He has authority to issue corrective actions.
12. During his fifteen-year tenure managing Housekeeping and Laundry, Mr. Wheeler walked through the laundry area on a daily basis. Mr. Wheeler did not witness Complainant having any anger outbursts at work during this period, until June 15, 2005.

Performance: 1999 - 2001

13. In July 1999, Complainant received a Confirming Memorandum regarding his "obsessive, bad attitude shown toward another employee by frequent bad-mouthing him to the rest of the workers. The snide remarks you make about people undermine the good qualities they do bring to the team effort." The memo stated, "Our agreement, after this discussion, is that effective immediately, there will be NO more negative comments made about any co-worker to your peers during work hours."
14. Complainant's annual evaluation for the period April 1999 through April 2000 was a Fully Competent. The narrative section noted his strengths as his ability to organize, be efficient, accomplish a lot, and be a "good steady worker" with "excellent" attendance. It also noted as Areas for Improvement: his "Temper outbursts and vocalizing his bad attitude about coworkers to others causes a lot of tension and bad feelings that reflect in product and 'team' cohesiveness."
15. Complainant was rated on a quarterly basis during the 2000 – 2001 performance cycle. He had serious problems with temper outbursts during this period, much of which related to his lead worker. These evaluations all rated him in the Competent range, and included positive feedback on organization, assisting others of whom he was fond, being punctual, and getting the work done. The first quarter referenced a "temper flare-up was scary – no memory of it." The second quarter referenced his "ragging about 'lead' behind his back," causing coworkers to feel uncomfortable.
16. The May 2001 evaluation noted, "Temper outbursts are still a serious problem: 4/5 slamming blues around because you forgot to deliver [something]; 4/2 – 6 slamming baskets around & pinching fingers of co-workers; 4/9 lashed out at Gary over group home delivery; 4/16 derogatory remark made when Gary volunteered to help Bill with Group homes."
17. The May 2001 evaluation continued, "Mandatory – go to anger control classes at C-SEAP all 4 meetings. Understanding and Agreement: 'There will be no more

demonstrations of bad temper. If it happens, there will be disciplinary action.” (Emphasis in original.) Complainant signed this agreement.

18. Complainant attended his first anger management classes in May 2001. The classes were held on four separate days, two hours per day.
19. Complainant learned at least one effective tool for handling his emotions at this training: walking away from a situation that bothered or upset him.
20. Mr. Wheeler believed that Complainant's behavior at work improved after he attended the anger management classes.

September 2001 Corrective Action

21. On September 10, 2001, Mr. Wheeler imposed a Corrective Action on Complainant for the following conduct: on September 5, 2001, a co-worker approached Complainant with a request to fill out a leave request form for a holiday. “[Complainant] instantly became angry, raised your voice, cursed as you walked away, and threw a door open as you left the room. When I approached you about this incident a short time later, you were still visibly angry and upset. Your response to this issue was that you got upset because you thought it was stupid, unnecessary, and a waste of time and paper, to have to fill out a leave slip for a Holiday. Although you said you were sorry, your actions and behavior, are in violation of” the Department's Workplace Violence policy.
22. The Corrective Action warned Complainant, “Effective immediately, you must interact with all customers, supervisors, and peers, in an appropriate manner. If you display any behavior that could be considered threatening, offensive or if you present yourself in an uncourteous or unprofessional manner you may be subject to further Corrective and/or Disciplinary Action, which may include termination of employment.”
23. During the meeting to discuss this Corrective Action, Complainant advised Mr. Wheeler that he had a brain injury from a car accident, and that his anger outbursts were the result of his brain injury. He informed Mr. Wheeler that he cannot control his anger outbursts because of his brain injury.
24. Complainant did not grieve the Corrective Action. However, he soon visited his physician and obtained a note about the effects of his brain injury on his ability to control his temper.
25. Mr. Wheeler required Complainant to bring in a doctor's note to verify his brain injury. Complainant obtained this note on December 26, 2001.

December 2001 Note from Dr. Pramenko

26. On December 26, 2001, Dr. Pramenko wrote a note on his office stationary, stating the following:

Re: Radebaugh, Richard. Patient had a severe motor vehicle accident on 4-21-1971. He suffered a severe head injury at that time. The head injury resulted in behavioral changes that could easily cause him to have an anger outburst. This is quite common with severe head injuries. Please contact me regarding Mr. Radebaugh if you have any questions."

27. Complainant handed this note to Mr. Wheeler in late December 2001.

28. On December 26, 2001, Dr. Pramenko charted an entry in Complainant's medical record, "Patient is requiring a note from work given some recent anger outbursts. He has not hurt anybody but he has had some fairly big outbursts that his boss is somewhat concerned about. Patient had a severe head injury in the 1970's which did leave him with some behavioral changes. ANGER OUTBURSTS AT WORK, LIKELY SECONDARY TO HEAD INJURY HE SUFFERED APPROXIMATELY 20-30 YEARS AGO. I wrote a note today for his boss at work explaining that his head injury likely led to some behavioral changes that leave him a little more susceptible to having anger outbursts. Hopefully this will be of help for Richard at work. Certainly his boss can contact me if there are any problems or concerns regarding this matter."

29. Dr. Pramenko noted the brain injury in Complainant's medical record annually, in the "Past Medical History" section. On July 11, 2002, Dr. Pramenko wrote, "Significant brain injury from a car accident that left him with personality changes." On October 14, 2003, he wrote, "Noted for significant head injury in 1978 leaving him with some speech changes and mild behavioral changes."

30. Mr. Wheeler forwarded the Pramenko note to the Human Resources office, which stamped it as having been received in January 2002.

31. Neither Mr. Wheeler nor the Human Resources office took action to follow up on the note from Dr. Pramenko. No one at DHS provided Complainant with information regarding his rights and responsibilities under the Americans with Disabilities Act (ADA).

32. Mr. Wheeler is not familiar with Respondent's ADA policy.

Performance: 2002 – 2005

33. Doug Berg, Laundry Housekeeping Supervisor, was Complainant's direct supervisor from October 2002 through termination. He was aware of Complainant's brain injury. Mr. Berg has not received training in the ADA.

34. Mr. Berg viewed Complainant as having positive and negative traits as a supervisee. Complainant was very dependable, did not miss work, arrived early to work, was a good team player, and was a real family man. On the other hand, Complainant was a team player so long as things were going his way, he was rigid about having access to the same place to sit in the break room and became upset when someone else sat in "his chair," Complainant became upset if the bedding became mixed up with the towels and washcloths, and he engaged in negative behaviors towards others, including coworkers, clients, and even supervisors.
35. When Complainant had temper outbursts at work, they would last anywhere from a few minutes, up to a couple of hours, during which he would mope and mumble to himself about something bothering him. This created friction in the workplace. Complainant mumbled about coworkers he felt did not perform well.
36. Complainant received an overall evaluation score of 2 ("Proficient, Good, Successful, Meets Expectations") for the 2001–2002 performance cycle. Respondent rated him at a Level 1, Needs Improvement, in the areas of Communication and Interpersonal Skills. The evaluation contained no narrative.
37. Respondent rated Complainant an overall 2 again for the 2002-2003 performance cycle. Complainant received no Needs Improvement ratings in any category. No narrative was provided.

December 2004 Corrective Action

38. On December 20, 2004, Mr. Wheeler issued a second Corrective Action to Complainant. The letter stated in part,

"Dee Webb reported to me that on December 13, 2004, at approximately 7:30 a.m., as she was getting into her car that was parked in a 15 minute loading zone behind Grand Mesa dorms, that you yelled at her to move her car and yelled things like, 'who do you think you are!' and 'Don't you know any better than that' and on and on like a 'madman.'

Even though she had been parking in this 15 minute loading area overnight for the last several days, you did not handle the situation appropriately. Your actions and behavior were rude, confrontational, and fall short of DFM's expectations of interactions with others."

39. The letter required Complainant to interact with all customers, supervisors, peers, and others in a professional and appropriate manner, and stated that failure to do so could result in further corrective or disciplinary action, up to termination.
40. Complainant did not grieve this Corrective Action.

41. Complainant attended mandatory anger management classes again on February 28 and March 1, 2005.

June 15, 2005 Incident

42. On June 15, 2005, after Complainant arrived at work, he noticed that the truck he normally used to deliver the laundry was not in the loading dock area. He and a new coworker, Joe Williams, were in the dock area, where the laundry was loaded onto the trucks that were available that day.
43. Williams had previously worked in the Housekeeping department for one year. June 15 was his second day on the job in the Laundry area.
44. Complainant and Williams began to load the truck with the carts they would use to pick up the laundry in the dormitories.
45. Suddenly, Complainant became very agitated about his usual truck not being there. He started slamming the carts into the truck, throwing carts around, and using profanity. Williams observed that Complainant was out of control.
46. Other Laundry staff witnessed Complainant's angry and violent episode, which lasted at least five minutes.
47. Margie Searcy, Complainant's lead worker, came over to the scene and asked Complainant why he was so angry. She explained to him that the truck he usually drove was not available because another employee had taken it in for repairs.
48. Complainant slammed laundry carts into the truck that was there and said, "I'm tired of this shit!" Complainant then walked away from her.
49. Ms. Searcy viewed his walking away from her as an act of defiance of her authority.
50. Searcy immediately contacted Mr. Wheeler, asking him to assist with the situation. When Mr. Wheeler arrived, he informed Complainant that he needed to see him in his office. Complainant responded that he did not want to talk to him. Mr. Wheeler repeated the instruction and Complainant followed Mr. Wheeler to his office.
51. Mr. Wheeler informed Complainant he was sending Complainant home to cool off. Complainant responded that he did not want or need to go home. Mr. Wheeler repeated his decision and directed Complainant to give him his DHS keys.
52. Complainant threw his keys on the floor at Mr. Wheeler's feet and walked out the door. Complainant then came right back in and picked up the keys and handed them to Mr. Wheeler.

53. Mr. Wheeler told Complainant to call Mr. Ron Sessem, Director of the Division of Facilities Management, appointing authority over Complainant, when Complainant had calmed down enough to talk to him.
54. Complainant next walked directly to Mr. Sessem's office and sat in the waiting area.
55. When Mr. Sessem arrived at work and greeted Complainant, Complainant told him that he needed to talk. Complainant informed Mr. Sessem that he had lost his temper again and that Mr. Wheeler said he had to meet with Mr. Sessem before he could return to work. Complainant stated that he was sorry that he lost his temper but that he was unable to control his temper when he got angry.
56. Mr. Sessem called Mr. Wheeler, who brought Mr. Sessem up to date on the morning's events. Mr. Sessem asked Mr. Wheeler to come to his office.
57. When Mr. Wheeler arrived in Mr. Sessem's office, Complainant was no longer angry. His demeanor demonstrated that he regretted his conduct that day and he knew he had made a mistake.
58. Msrs. Wheeler and Sessem met privately, then asked Complainant to join them.
59. Complainant, Mr. Wheeler, and Mr. Sessem then met in Mr. Sessem's office. Complainant admitted to his conduct that morning and was remorseful. Mr. Sessem informed Complainant that he would have to schedule a pre-disciplinary meeting with Complainant to address the conduct, that he could have a representative of his choice, including an attorney, at that meeting, and that he would be placed on paid leave pending that meeting. Mr. Sessem informed Complainant that he would be out of town for a while, so the meeting would take place after his return.
60. Complainant became very upset about the prospect of being on leave and having to wait to have the pre-disciplinary meeting. He insisted on having the meeting at that time. Complainant made it clear he did not want to leave Mr. Sessem's office until the meeting was held.
61. Mr. Sessem agreed to set the meeting for 10:00 a.m. that day, and sent him home. Complainant left.
62. Mr. Sessem directed Mr. Wheeler and Ms. Searcy to document the incident that had occurred that morning.

Pre-disciplinary meeting on June 15, 2005

63. Mr. Sessem contacted the HR office and requested that one of their staff members attend the pre-disciplinary meeting with him, as his representative. Karen Briggs, HR Specialist and Risk Manager for Respondent, attended. Ms. Briggs is not Respondent's ADA Coordinator; she is the Family Medical Leave Act Coordinator.

64. Complainant attended the meeting with his wife, Ms. Margaret Scholl, as his representative. Ms. Scholl works as a Psychiatric Technician for DHS.
65. Mr. Sessem opened the meeting by reading the written statements of Ms. Searcy, detailing the incident, and of Mr. Wheeler, detailing his later involvement, aloud.
66. Complainant noted that he had picked up the keys and handed them to Mr. Wheeler, after throwing them.
67. Mr. Sessem reviewed the fact that he had met with Complainant that morning in his office, and stated that Complainant had told him that he was sorry about this, and he couldn't control his temper.
68. Complainant responded that he could not control his temper, at times.
69. Mr. Sessem asked Complainant to provide his side of the story. Complainant explained that he disliked the truck available that day because the gate is heavy to lift and difficult to load. He stated, "I shouldn't have gotten mad, I know, but I can't control it."
70. Mr. Sessem asked if there was anything going on in his life, or whether there was anything he wanted to talk about. Complainant responded, not that he knew of.
71. Complainant's wife then stated that Complainant's brother had just died a couple of weeks ago, and that was causing a lot of stress. He had died in Cancun, Mexico, after being carried out to sea in a riptide.
72. Ms. Scholl then stated, "He had a head injury, you know, when he was young and I think even the doctors say, he won't, he doesn't do anything physically he just gets angry. He just mouths off; he can't control what he says. But uh that's just part of being, of having, a head injury. And that is something that everybody who knows Ric knows how to deal with."
73. She and Complainant then both stated that this behavior was inappropriate in the workplace.
74. Ms. Scholl pointed out that Complainant never became physical and was not dangerous, and that after he is angry he calms down and is fine.
75. Complainant explained to Mr. Sessem that Ms. Searcy had "gotten into his face" and that he could have cooled off a lot quicker if she had not been confrontational with him.
76. Mr. Sessem indicated that she needed to intercede as the supervisor. Ms. Scholl stated that when Complainant becomes angry, he needs to "go to a quiet room or to

some room, but I don't know whether you guys can accommodate that." She suggested that they try sending him to a corner or any designated place to cool off.

77. Ms. Briggs asked if it seemed the outbursts were becoming more frequent. Complainant stated they occurred about once a year. When Briggs repeated her question, Ms. Scholl said that it seemed like it and Complainant said, "yes."

78. Ms. Briggs asked, "Is there any kind of medication or counseling, anger management classes, I mean I'm not real familiar with head injury kinds of stuff, but are there other pieces in place that are common to head injury folks that could assist him in recognizing signals."

79. Ms. Scholl responded that they had not gone to the doctor to find that out and that it was entirely possible.

80. Ms. Briggs suggested that just as alcoholics can be taught to recognize signs they want to drink, that head injury victims may have similar means of recognizing when they will have an outburst.

81. Ms. Scholl stated that they could check with Complainant's doctor about that.

82. They discussed the effect of Complainant's behavior on others in the workplace. Complainant indicated that he would never hurt anyone else, and would hurt himself before he hurt anyone else.

83. Ms. Scholl stated, "You [Complainant] need to figure out something before you say these things and do these things and we should have checked into that with Dr. Pramenko. Uh I know he wrote a letter to the State saying that because of the head injury, it causes Ric to lose control a little faster than it does normal people, but we've never checked into what kind of treatment they could have for him."

84. Ms. Briggs asked if they had a copy of the letter. Complainant stated that Mr. Wheeler does, and that it is in his file and Ms. Briggs should have a copy of it.

85. Mr. Sessem asked if there was anything else Complainant would like to say.

86. Complainant stated, "I'm sorry it happened, but it's after the fact, I've cooled down and I am in control. I do after I've done cause I cool down and I understand. I'm feeling real sorry about it, but it just happened."

Follow-up on Pre-disciplinary Meeting

87. After the pre-disciplinary meeting, Mr. Sessem had the HR office retrieve the December 2001 letter from Dr. Pramenko. Mr. Sessem read the letter.

88. He gave the letter little weight because he was focused on Complainant's pattern of poor performance that had, in his estimation, grown over the years.
89. When Mr. Sessem read the letter from Dr. Pramenko, he did not believe that Complainant's actions at work were caused by his brain injury. He made this conclusion on the basis of his experience with Complainant having followed instructions in the past.
90. Mr. Sessem concluded that Complainant had engaged in willful misconduct. He believed that Complainant was able to control his behavior but chose not to do so. Mr. Sessem was very concerned about Complainant having been insubordinate to Mr. Wheeler and having defied his instruction to go home early that morning.
91. Mr. Sessem did not consult with Complainant's treating physician regarding the potential for medication or counseling or any other type of treatment to assist Complainant in addressing his temper flare-ups prior to terminating him.
92. Mr. Sessem did not consider obtaining a threat assessment of Complainant prior to terminating his employment.
93. Mr. Sessem did not consider any of the statements by Ms. Scholl at the pre-disciplinary meeting, or the 2001 Pramenko note, to be a request for a reasonable accommodation under the ADA. He was not familiar with or trained in Respondent's ADA policy.
94. Mr. Sessem met with Ms. Briggs and they discussed the Pramenko letter. He advised Ms. Briggs that his intention was to terminate Complainant's employment.
95. Prior to imposing disciplinary action, Mr. Sessem reviewed Complainant's personnel file, including his performance history. He gave heavy weight to the prior corrective actions.
96. At all times relevant, Complainant was able to perform the essential functions of his position.

Workplace Violence Policy

97. Respondent's Workplace Violence Policy, Policy Number VI-3.5, states in part:

- The CDHS is committed to working with managers, supervisors, and employees to maintain a work environment that is free from violence against persons and property, threats of violence, harassment, and/or intimidation;
- Threats, harassment, intimidation include oral or written statements, gestures, or expressions that communicate a direct or indirect intent to commit physical and or psychological harm.

98. The policy permits, but does not require, appointing authorities to obtain threat assessments of employees who may pose a threat to co-workers.

ADA Policy

99. Respondent's ADA Policy, Policy Number VI 1.4, states in part:

- CDHS will comply with the requirements of the Rehabilitation Act of 1973, the Americans with Disability Act (ADA) of 1990, and their implementation rules and regulations;
- To request a reasonable accommodation, an employee must make a request of his/her immediate supervisor, who will immediately communicate the request to the Department ADA Coordinator. The request shall be submitted on the Request for Reasonable Accommodation Due to Disability form;
- The Civil Rights Unit will process requests for reasonable accommodation in a prompt, fair and efficient manner;
- Individual With a Disability: Is a person who has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded by others as having such an impairment;
- Major life activities: Activities that an average person can perform with little or no difficulty such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, sitting, standing, lifting, and working;
- Physical or mental impairment: Any physiological disorder or condition, . . . or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs, including speech organs . . . Also includes any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;
- Reasonable accommodation: Is a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity or access to programs and services. The reasonableness of the accommodation is determined on a case-by-case basis.

Termination Decision

100. Mr. Sessem did not consider any disciplinary action other than termination.

101. On June 16, 2005, he sent Complainant the termination letter. The letter outlined his conduct on June 15, 2005. It then reviewed much of what was said at the pre-disciplinary meeting, including Complainant's admission of wrongdoing, the fact that his brother had just died, and his wife's statement that his behavior was typical of a brain injured individual. He noted Complainant's request for his co-workers to "just give you space and let you cool off when you lose your temper, or give you an assignment where you could work alone."

102. Mr. Sessem noted that his personnel record indicates he had received counseling and two corrective actions for similar incidents. He concluded, "Your violent behavior and insubordination in the workplace is unacceptable and cannot be tolerated. My findings indicate that your outbursts have become more frequent, and continue to escalate in intensity. I am honestly concerned for the safety and welfare of the staff and clients that work in our laundry department. For this purpose, it is my decision to terminate your employment . . ."

103. Complainant timely appealed his termination.

DISCUSSION

I. BURDEN OF PROOF

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-125, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-12, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen, supra*. The Board may reverse the agency's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. COMPLAINANT COMMITTED THE ACTS UPON WHICH DISCIPLINE WAS BASED

Respondent has met its burden of proving by preponderant evidence that Complainant committed the acts for which he was disciplined. In fact, Complainant admits to having engaged in the conduct alleged on June 15, 2006, namely, losing his temper, shoving laundry carts into a truck and using profanity, walking away from his

lead worker when she attempted to talk to him, initially refusing to accompany Mr. Wheeler to his office, and throwing his keys at Mr. Wheeler's feet.

Complainant's conduct on June 15, 2005 violated Respondent's Workplace Violence policy. His actions were violent and intimidating to those around him, including Mr. Williams, Ms. Searcy, and Mr. Wheeler.

III. THE DISCIPLINE IMPOSED WAS NOT ARBITRARY, CAPRICIOUS OR CONTRARY TO RULE OR LAW

In determining whether an agency's decision is arbitrary or capricious, it must be determined whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

In addition, Board Rule 6-9 requires,

"The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered.

Appointing authorities are required to give candid and honest consideration to mitigating information presented by employees, as well as all other factors listed in Rule 6-9, prior to imposing disciplinary action.

The preponderance of evidence demonstrates that Respondent did consider all of the required criteria prior to imposing disciplinary action. The termination letter lists and discusses the mitigating information provided by Complainant: he had just lost his brother in a horrifying accident two weeks prior to the incident; he has a brain injury that impairs his ability to control his temper, and he was deeply remorseful about his behavior. In addition, Mr. Sessem read the December 2001 letter describing the effects of Complainant's brain injury on his temper prior to making the disciplinary decision.

Additional information considered by the appointing authority included the following: Complainant was a fifteen-year employee; he was a reliable, efficient, productive worker; he had a longstanding history of bad-mouthing other employees and his lead worker, causing morale among his coworkers to suffer; he had received two

corrective actions for temper outbursts, one within six months of his termination; he had attended anger management classes twice; and, most of his performance evaluations referenced his temper outbursts (one even mentioned his having pinched co-workers).

Paramount in any appointing authority's scope of duties is the responsibility to provide a safe and violence-free working environment for state employees. Given the Complainant's long and consistent track record of uncontrolled temper outbursts at work, a reasonable appointing authority could have determined that it was not possible to assure such an environment for the Laundry workers (and the Regional Center residents who worked alongside Complainant) if Complainant continued his employment.

There is no question that another appointing authority might have exercised his discretion differently, by providing Complainant time to explore alternate means of controlling his temper with his physician. However, it cannot be said, as a matter of law, that "reasonable men fairly and honestly considering the evidence must reach contrary conclusions" than those reached in this case. *Lawley, supra*. Therefore, Respondent did not act in an arbitrary and capricious manner.

IV. COMPLAINANT WAS NOT DISABLED UNDER CADA OR THE ADA

Complainant asserts that he was terminated on the basis of disability in violation of the Colorado Anti-Discrimination Act, section 24-34-402, C.R.S. ("CADA").

Under the Act,

"It shall be a discriminatory or unfair employment practice: (a) For an employer . . . to discharge . . . any person otherwise qualified because of disability . . . but, with regard to a disability, it is not a discriminatory practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job." Section 24-34-402(1), C.R.S.

Whenever possible, the CADA should be interpreted consistently with the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et seq. (2006). *Tesmer v. Colorado High School Activities Ass'n*, 140 P.3d 249, 253 (Colo.App. 2006). See, Colo. Div. Civil Rights Rule 60.1(B), finding the CADA to be "substantially equivalent" to the ADA, and Rule 60.1(C), (whenever possible, the CADA should be interpreted consistently with the ADA). Further, Board Rule R-9-4 provides, "Standards and guidelines adopted by the Colorado Civil rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred." 4 CCR 801.

To establish a prima facie case of disability discrimination, an employee must show: (1) he is disabled within the meaning of the act; (2) he is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) he was discriminated against because of his disability. *Mason v. Avaya Communications, Inc.*, 357 F.2d 1114, 1118 (10th Cir. 2004).

Disability under the Act “means a physical [or mental] impairment which substantially limits one or more of a person’s major life activities and includes a record of such an impairment and being regarded as having such an impairment.” Section 24-34-301(2.5)(a), C.R.S. The Act defines a covered mental impairment as “any mental or psychological disorder such as developmental disability, organic brain syndrome, mental illness, or specific learning disabilities.” Section 24-34-301(2.5)(b)(III), C.R.S.

Colo. Div. Civil Rights Rule 60.1(D)(1)(b) defines “Mental impairment” as “any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term ‘physical or mental impairment’ includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, and emotional illness.”

The evidence demonstrates that Complainant suffers from a serious brain injury, which is accepted as a mental impairment for purposes of this opinion. However, Complainant has not demonstrated that his impairment substantially limits him in one or more major life activities. “Major life activities” “means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 CFR §1630.2(i). “Substantially limits” means either “unable to perform a major life activity that the average person in the general population can perform” or “significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.” 29 CFR, §1630.2(j).

Complainant asserts that his brain injury substantially limits him in the major life activity of communicating. The evidence does not support this contention. As a general matter, Complainant communicates normally with others. While he slurs his words, he converses without incident. The evidence, while not well developed on this issue, suggests that Complainant’s brain injury causes him to lose control of his emotions only sporadically. The temper problems caused by his injury are infrequent and random in nature. There is no evidence in the record that Complainant’s brain injury renders him “unable to” communicate normally on a regular basis, or that it “significantly restricts” his ability to communicate normally. *Id*; *Tesmer*, 140 P.3d at 254-255.

Complainant has failed to establish that he has a disability as defined under the CADA or ADA. Therefore, Respondent had no duty under these authorities to accommodate his impairment.

V. THE DISCIPLINE IMPOSED WAS WITHIN THE RANGE OF REASONABLE ALTERNATIVES

The discipline imposed was within the range of reasonable alternatives available to the appointing authority in this case, in view of the dramatic and violent nature of Complainant's temper outbursts. It was reasonable for Respondent to separate Complainant from employment, in order to protect others in the workplace from further incidents such as that which occurred on June 15, 2005.

It is further noted, however, that it would also have been reasonable for an appointing authority in this case to consider imposing a lighter disciplinary action, which would have provided Complainant with time to explore medical or therapeutic interventions to address his anger outbursts.

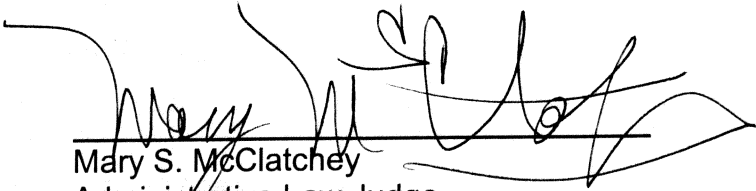
CONCLUSIONS OF LAW

1. Complainant committed the acts upon which discipline was based;
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law;
3. Respondent did not discriminate against Complainant on the basis of disability;
4. The discipline imposed was within the range of reasonable alternatives.

ORDER

The action of Respondent is **affirmed**. Complainant's appeal is dismissed with prejudice.

DATED this 28th day
of **December 2006** at
Denver, Colorado.



Mary S. McClatchey
Administrative Law Judge
633 17th St., Suite 1320
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is \$50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 9 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.

CERTIFICATE OF MAILING

This is to certify that on the ^{4th} 28 day of **December 2006**, I placed true copies of the foregoing **INITIAL DECISION; NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Patricia Cookson, Esquire
843 Rood Avenue
Grand Junction, Colorado 81501

And interagency mail to:

Brooke Meyer
Assistant Attorney General
Employment Section
1525 Sherman Street 5th Floor
Denver, Colorado 80203


Andrea C. Woods